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# In the Supreme Court of the United States

OCTOBER TERM, 1956

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UNITED STATES OF AMERICA, APPELLANT

*v.*

CHARLES T. HVASS

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*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA, CENTRAL DIVISION*

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## JURISDICTIONAL STATEMENT

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## JURISDICTIONAL STATEMENT

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### OPINION BELOW

The memorandum decision of the District Court (App. A, *infra*, pp. 9-15) is not reported.

### JURISDICTION

On December 27, 1956, the United States District Court for the Northern District of Iowa entered an order (App. B, *infra*, p. 16) dismissing the indictment for perjury on the ground that sworn testimony given in a proceeding conducted under local rule of court to determine an attorney's fitness to prac-

tice before the court was not testimony in a "case in which a law of the United States authorizes an oath to be administered," within the meaning of the federal perjury statute (18 U.S.C. 1621). A notice of appeal to this Court was filed in the District Court on January 24, 1957. The jurisdiction of this Court to review on direct appeal an order dismissing an indictment, based on a construction of the statute upon which the indictment rests, is conferred by 18 U.S.C. 3731.

## STATUTE AND RULE INVOLVED

18 U.S.C. 1621 provides in pertinent part:

> Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury
> * * *

Local Rule 3 of the United States District Courts for the Northern and Southern Districts of Iowa provides:

> All attorneys residing outside of the State of Iowa and having civil matters in the court shall associate with them a resident attorney on whom notice may be served and who shall have the authority to act for and on behalf of the client in all matters, including pre-trial conferences and the trial of the case. Such resident attorney shall be a member of the bar of the District, shall sign the

first pleading filed and continue in the matter unless other qualified resident counsel be substituted. Non-resident attorneys who have so associated with them a resident attorney shall be permitted to participate in a particular case upon satisfactory showing of good moral character.

Provided further that where the action is one to recover damages for personal injuries sustained in Iowa by one who at the time was a resident of Iowa or the action is one to recover damages for the death of a resident of Iowa resulting from personal injuries sustained in Iowa, the Court may on its own motion, or on motion of a member of the bar of either District, before permitting a nonresident attorney to participate in the case, require a satisfactory showing that the connection of the said attorney, or the firm or attorney with which he is associated, was not occasioned or brought about in violation of the standards of conduct specified in Rule 8 hereof. The Court as a part of said showing may require the plaintiff and the said attorney to appear and be examined under oath.

## QUESTION PRESENTED

Whether a willful false statement of a material fact, made by an attorney under oath during a district court's examination into his fitness to practice before it, constitutes perjury within the meaning of 18 U.S.C. 1621.

## STATEMENT

Local Rule 3 of the United States District Courts for the Northern and Southern Districts of Iowa provides a method by which the court may require a satisfactory showing of acceptable standards of conduct by non-

resident attorneys before permitting them to appear in Iowa district court cases involving claims for personal injuries or unlawful death sustained in Iowa by residents of Iowa. The rule provides that, as a part of such showing, the plaintiff and the non-resident attorney may be required to appear and be examined under oath.

Pursuant to this rule, the United States District Court for the Northern District of Iowa entered an order requiring the non-resident attorneys interested in two Iowa negligence cases to appear and be examined under oath if they wished to participate in those cases. Appellee Hvass, a non-resident attorney from Minneapolis, Minnesota, appeared and was examined under oath by the United States Attorney. At the conclusion of the hearing, the court found that he had not made a satisfactory showing under Local Rule 3, denied his application to participate in the two cases, and struck the appearance of his law firm as attorneys for the plaintiff in each case.

On March 20, 1956, a four-count indictment was returned in the same district court, charging Hvass with violation of the federal perjury statute, 18 U.S.C. 1621, *supra*, p. 2. Each count charged him with giving false testimony at the admission hearing in response to questions bearing on champerty and maintenance. A motion to dismiss the indictment was sustained in a memorandum decision holding that the rule under which Hvass took his oath "is not such a law of the United States as was intended by Congress to support an indictment for perjury." Although the court agreed that "[w]ithout question a United States District Court has the right to determine the fitness of attorneys who

may practice in such court," it held that once an attorney's fitness had been determined the purpose of Rule 3 had been served and testimony adduced at the hearing could not later be used to support an indictment for perjury. "In seeking to do so," the District Judge stated, "it appears to me that the United States is going far beyond what Congress intended in granting the rule making power to the courts."

## THE QUESTION IS SUBSTANTIAL

1. The court below has held in substance that the sanction of the federal perjury statute (18 U.S.C. 1621, *supra*, p. 2) is inapplicable when a witness is examined under oath in an ancillary matter or proceeding. The court did not doubt that an inquiry into the fitness of an attorney to practice before the court was within the realm of judicial competence. It was of the view, however, that testimony which is not part of a trial proper is not punishable under the statute, however false it may be. It is apparent that the limiting effect of such a precedent may make itself felt in numerous situations; the district courts have frequent occasion to conduct hearings or proceedings of an ancillary nature, both under their rules and in the exercise of their inherent or implied powers. If witnesses examined in such proceedings are not subject to the normal penalties which may be imposed for the giving of false testimony, it can hardly be denied that there is a serious limitation—one hitherto unsuspected—upon the capacity of the district courts to conduct their business effectively.

We believe that the decision rests upon an unduly narrow and an unwarranted construction of the perjury statute—specifically, of the language which re-

quires the case to be one "in which a law of the United States authorizes an oath to be administered." It is true that there is no Act of Congress which declares that a district court in examining into the fitness of attorneys to practice before it (or into other similar matters) may put witnesses under oath. It is no less true, however, that there is no statute or federal rule providing in terms that a witness who testifies at a district court trial shall be (or may be) put under oath. The power of the court to swear the witness called to testify in a matter within the competence of the court is an inherent attribute of the judicial power and hence one which has never been deemed to require elucidation by statute. Note, for example, that the Federal Rules of Civil Procedure, although they make no provision for administration of an oath to a witness before the court, specifically confer upon masters power to put witnesses under oath. Rule 53(c). See 70 *Corpus Juris* 482, note 30(h), for state cases discussing a court's inherent power to administer an oath to a witness.

The history of the requirement that a witness must take an oath in order to give testimony goes back to early civilizations and has a long history at common law. *Wigmore on Evidence,* 3d ed., Sec. 1815. "The oath used to be regarded as a summoning of Divine vengeance upon false swearing, whereby when the spectators see the witness standing unharmed they know that the Divine judgment has pronounced him to be a truth-teller. But it is now conceived as a method of reminding the witness strongly of the Divine punishment somewhere in store for false swearing, and thus of putting him in a frame of mind calculated to speak only the truth as he saw it." *Id.,* Sec. 1816. For centuries Anglo-American law has remained faithful to

the precept that "for *all testimonial statements made in court* the oath is a requisite (*id.*, Sec. 1824), the only qualification being that it is now generally permitted, both in English and American jurisdictions, to substitute a solemn affirmation for an oath. *Id.*, Sec. 1828; Federal Rules of Civil Procedure, Rule 43(d).

We submit, in brief, that the law of the United States which permits a court to put a witness under oath is found in the common law and in such constitutional and statutory law as confers the judicial power upon a designated tribunal. Since the authority is implicit in the judicial power, nothing more explicit than the conferral of that power is required.

So viewed, the question in the instant case is whether the inquiry made was within the scope of the judicial power or competence. On this point, the court below had no doubt; it held that "without question" the district courts possess power to examine into the fitness of attorneys to practice before them. App. A, *infra*, p. 14. This holding, we think, was plainly correct. *Ex parte Secombe*, 19 How. 9, 13; *Atchison, Topeka and Santa Fe Railway Co.* v. *Jackson*, 235 F. 2d 390, 393 (C.A. 10).

2. For the reasons indicated above, we are of the view that the district court was authorized by "a law of the United States" to administer the oath, entirely apart from its local rule of court. We also believe that the local rule (which, it should be noted, provides for examination under oath, *supra*, p. 3) must be considered "a law of the United States" within the meaning of the perjury statute, since it represents a proper and permissible exercise of the rule-making power delegated by Congress. 28 U.S.C. 2071 broadly states: "The

Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court." 28 U.S.C. 1654 provides: "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel, as, *by the rules of such courts,* respectively, are permitted to manage and conduct causes therein" (emphasis added). See, also, Federal Rules of Civil Procedure, Rule 83. Since the local rule of court had the force of law, it sustains the perjury indictment herein. Cf. *United States* v. *Howard,* 352 U.S. 212.

## CONCLUSION

Whether the universal power of courts to put witnesses under oath—a power inherent in the judicial function as we know it—extends to ancillary matters within the judicial competence, as well as to proceedings which are conventional trials, is a question of substantial importance in the working of the judicial system. Accordingly, it is respectfully submitted that this Court should note probable jurisdiction of the appeal.

J. LEE RANKIN,
*Solicitor General.*

WARREN OLNEY III,
*Assistant Attorney General.*

BEATRICE ROSENBERG,
ALBERT M. CHRISTOPHER,
*Attorneys.*

MARCH, 1957.

APPENDIX A

# UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA. CENTRAL DIVISION

Criminal No. 2358

UNITED STATES OF AMERICA, PLAINTIFF

*v.*

CHARLES T. HVASS, DEFENDANT

## MEMORANDUM DECISION

Mr. F. E. Van Alstine, United States Attorney, and Mr. T. G. Gilinsky, Assistant United States Attorney, of Sioux City, Iowa, appeared in behalf of the plaintiff;

and

Mr. Warren B. King, of King & MacGregor, of Minneapolis, Minnesota, and Mr. M. E. Rawlings, of Sioux City, Iowa, appeared in behalf of the defendant.

This matter is before the Court upon the defendant's motion to dismiss the indictment on the ground that the same does not state facts sufficient to constitute an offense against the United States.

The defendant, Charles T. Hvass, is an attorney with his office in Minneapolis, Minnesota, and is a member in good standing of the bars of the states of Minnesota and Texas, and has been admitted to practice before the United States District Court for the District of Minnesota, and the United States Court of Appeals for the Eighth Circuit. Hvass represented injured workmen in two suits which were filed in this court, Wyrum v. Mason City & Clear Lake Railroad Co.,

Civil No. 644, and Lash v. Chicago Great Western Railway Co., Civil No. 663. At the time those suits were filed in this court, Local Rule 3 of the Northern and Southern Districts of Iowa provided as follows:

> "All attorneys residing outside of the state of Iowa and having civil matters in the court shall associate with them a resident attorney on whom notice may be served and who shall have the authority to act for and on behalf of the client in all matters, including pretrial conferences and the trial of the case. Such resident attorney shall be a member of the bar of the District, shall sign the first pleading filed and continue in the matter unless other qualified resident counsel be substituted. Non-resident attorneys who have so associated with them a resident attorney shall be permitted to participate in a particular case upon satisfactory showing of good moral character."

The evident purpose of the rule is to assure the court that when out of state attorneys appear as counsel in any case, that there will be no delays for hearings on motions, pre-trial conferences and other matters which may arise during the trial, and so that service of papers may be accomplished locally at any stage of the proceedings. A similar rule will be found in the rules of most United States District Courts.

Subsequent to the commencement of the Wyrum and Lash cases, and on August 31, 1955, the judges of the Northern and Southern Districts of Iowa entered an order amending Rule 3 by adding thereto the following proviso:

> "Provided further that where the action is one to recover damages for personal injuries sustained in Iowa by one who at the time was a resident of

> Iowa or the action is one to recover damages for the death of a resident of Iowa resulting from personal injuries sustained in Iowa, the court may on its own motion, or on motion of a member of the bar of either District, before permitting a non-resident attorney to participate in the case, require a satisfactory showing that the connection of the said attorney, or the firm or attorney with which he is associated, was not occasioned or brought about in violation of the standards of conduct specified in Rule 8 hereof. The court as a part of said showing may require the plaintiff and the said attorney to appear and be examined under oath."

It is this amended Rule 3 with which we are now concerned. The amendment became effective on October 1, 1955, as to actions then pending or thereafter commenced.

On October 3, 1955, the court entered an order fixing October 12, 1955, as the date for non-resident attorneys in the Wyrum and Lash cases to appear, if they wished to participate in those actions, and be examined under oath in regard to matters within the scope of amended Rule 3. The defendant Hvass did appear, and was examined under oath by the United States Attorney. Administration of the oath to Hvass was not a part of any judicial proceeding in the Wyrum and Lash cases, but rather was a part of an administrative proceeding by which the court sought to determine whether Hvass should be permitted to participate as an attorney in these cases. Two further hearings were held, and witnesses subpoenaed both by the United States and by the defendant Hvass, were examined and cross-examined. Thereafter, on November 1, 1955, the court entered an order finding that the injuries for which recovery was sought in each case were sustained in the

State of Iowa by residents of Iowa and that "the applicant has not made satisfactory showing of the matters which must be satisfactorily shown under said Local Rule 3." Thus the court denied the application of Hvass to participate in the two cases and struck the appearance of the firm of Hvass, Weisman, Peterson, King and Schwappach as attorneys for plaintiff in each case.

On March 20, 1956, the present indictment was returned, charging the defendant Hvass with the crime of perjury under four separate counts in violation of 18 U.S.C.A. Sec. 1621.[1] The indictment charges under each count thereof that the alleged false testimony was given under and pursuant to the provisions of Rule 3, supra, and Rule 8,[2] Local Rules of the United States District Court, Northern District of Iowa.

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[1] Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, wilfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty or perjury * * *.

[2] "CONDUCT AND DUTIES; DISBARMENT AND DISCIPLINE

"The standards of conduct and duties of members of the bar of the District shall be those prescribed by Chapter 610, Code of Iowa 1950, by the oath set forth in Rule 1 hereof, and by the Canons of Professional Ethics of the American Bar Association, and amendments thereto.

"For violation of such standards of conduct and duties any member of the bar of the District for good cause shown, and after an opportunity has been given to be heard, may be disbarred, suspended from practice for a definite time, reprimanded, or subjected to such other discipline as the court may deem proper.

"Whenever it is made to appear to the court that any member of its bar has been disbarred or suspended from practice, or convicted of a felony in any other court he shall be suspended forthwith from practice before this court, and, unless upon notice mailed to him at his last known address, he shows good cause to the con-

Let us first consider briefly the rule making power of a United States District Court. Such rule making power is found in 28 U.S.C.A. Sec. 2071:

> "The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court."

Rule 83 of the Federal Rules of Civil Procedure is as follows:

> "RULES OF DISTRICT COURTS:
>
> "Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the Supreme Court of the United States. In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules."

Thus Congress and the Supreme Court of the United States have recognized the necessity of broad rule making powers of the courts to enable them to prescribe complete and uniform modes of procedure. It appears, however, that Sec. 1621 and Rule 83, supra, were in-

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trary within fifteen days, there shall be entered an order of disbarment, or of suspension for such time as the court shall fix.

"Any person who before his admission to the bar of this court, or during his disbarment or suspension, exercises in the District in any action or proceeding pending in the court any of the privileges of a member of the bar, or who pretends to be entitled so to do, shall be guilty of contempt of court, and shall subject himself to appropriate punishment therefor."

tended only to cover matters of practice and procedure. Likewise amended Rule 3 was promulgated for the purpose of determining the fitness of lawyers falling within its terms, to participate in certain actions before the court. Following the oral hearings at which the defendant Hvass testified, the Court determined that he had not made a satisfactory showing under Rule 3 and he was denied the right to participate in the Wyrum and Lash cases. Without question a United States District Court has the right to determine the fitness of attorneys who may practice in such court. See the recent case of In re Wasserman, — F. 2d —, 9th Cir., October 2, 1956. However, after Rule 3 had served its purpose and the court denied the defendant Hvass the right to participate in the Wyrum and Lash cases, the United States now seeks to prosecute him for perjury based upon the testimony given by him at these hearings. In seeking to do so, it appears to me that the United States is going far beyond what Congress intended in granting the rule making power to the courts.

The essential elements of the crime of perjury as defined in 18 U.S.C.A. Sec. 1621 are (1) an oath authorized by a law of the United States, (2) taken before a competent tribunal, officer or person, and (3) a false statement wilfully made as to facts material to the hearing. United States v. Debrow, 346 U.S. 374. Under point one above, we recognize that generally speaking a rule of court has the force of law. In re Giannini, Inc., 90 F. 2d 445; Galveston Dry Dock & Construction Co. v. Standard Dredging Co., 40 F. 2d 442. We are here confronted with an unusual situation, namely, a perjury indictment, predicated upon a rule of court that is in itself rather unique and unusual. It gives to the court the discretion to determine when the attorney shall be required to make a satisfactory showing in regard to Rule 8, supra, and the further discretion

to place the witness under oath. The purpose of the rule was accomplished when Hvass was denied the right to participate in the Wyrum and Lash cases and if disciplinary action against the defendant Hvass is deemed advisable such action should be instituted in the regular manner.

The defendant urges that Rule 3 is invalid upon several grounds and contends that his motion to dismiss the indictment must be sustained for this reason. In my opinion it is not necessary for me to pass upon this question. I simply hold that Rule 3, under which the defendant took his oath, is not such a law of the United States as was intended by Congress to support an indictment for perjury.

The defendant's motion to dismiss will be granted. Defendant's counsel may prepare and submit a formal order dismissing the indictment, and as to all four counts thereof.

Dated this 20th day of December, 1956.

By the Court:

GEORGE T. MICKELSON,
*United States District Judge,*
*By Assignment to the Northern*
*District of Iowa.*

APPENDIX B

# UNITED STATE DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA, CENTRAL DIVISION

Criminal No. 2358

UNITED STATES OF AMERICA, PLAINTIFF

*vs.*

CHARLES T. HVASS, DEFENDANT

## ORDER

The defendant's motion to dismiss the indictment having been noticed for hearing and heard on November 13, 1956, the plaintiff appearing by Mr. F. E. Van Alstine, United States Attorney, and Mr. T. G. Gilinsky, Assistant United States Attorney, and the defendant by Messrs. Warren B. King and M. E. Rawlings, their respective attorneys, and the court being advised in the premises,

IT IS ORDERED, that the motion be granted and judgment entered dismissing the indictment, and all four counts thereof, for failure to state facts sufficient to institute an offense against the United States.

By the Court:

(S.) GEORGE T. MICKELSON,
*United States District Judge,*
*District of Iowa.*

Dated December 27, 1956.

Filed in the District Court December 27, 1956.

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